In the Matter of	:	
	:	
DOUGLAS SWANK	:	
Complainant	:	
	:	Case No.: 1998-STA-4
v.	:	
	:	
FOUR WINDS INC.	:	
d/b/a PEOPLE'S CHOICE	:	
TRANSPORTATION, INC.	:	
Respondent	:	

Douglas Swank, pro se
For the Complainant

Jamison Poindexter Milford, Esq.
For the Department of Labor

Bradley N. Shefin, Esq.
For the Respondent

Before: THOMAS M. BURKE
ASSOCIATE CHIEF JUDGE

RECOMMENDED DECISION AND ORDER

Douglas Swank ("Complainant") filed a complaint with the Department of Labor on or about November 14, 1997 alleging that Four Winds Inc., d/b/a People's Choice Transportation, Inc., ("Respondent") took disciplinary action against him in violation of section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305 ("STAA"). The Regional Administrator of the Occupational Safety and Health Administration in Denver, Colorado, issued his determination on January 6, 1998 for the Secretary of Labor, that Complainant's complaint had merit and that Respondent's action violated section 405 of the STAA.

Respondent filed a written objection to the Regional Administrator's determination on February 2, 1998 and requested a hearing before the Office of Administrative Law Judges. The Assistant Secretary of Labor for Occupational Safety and Health becomes the prosecuting party in this matter by operation of 29 C.F.R. §1978.107(a).

A hearing was set for March 24 and 25 1998 in Denver, Colorado. Respondent moved to continue the hearing to pursue discovery. (Motion To Continue Hearing dated March 10, 1998) The motion was denied by Order dated March 19, 1998, which Order also required the Department of Labor to provide to counsel for Respondent the OSHA investigator's notes of interviews with

witnesses to be called by the Department of Labor and the notes of interviews of the three customers of the Respondent. (Order dated March 19, 1998)

The hearing on the merits of the complaint was held on March 24, 25 and 26, 1998. Prosecuting Party and Respondent filed post-hearing briefs on May 22 and May 27, 1998, respectively and both parties filed rebuttal briefs on June 8, 1998.

FINDINGS OF FACT

Complainant, Douglas Swank, a resident of Orange City, Florida, was employed by Respondent from on or about August 1, 1997 until November 13, 1997 operating commercial motor vehicles as he operated passenger buses with a gross vehicle weight rating of over 10,000 pounds. (Stipulation)

Respondent is a commercial motor carrier doing business as People's Choice Transportation, Inc. and maintaining an address in Commerce City, Colorado. Respondent is engaged in interstate commerce through its scheduled and chartered passenger bus operations.(Stipulation)

Respondent hired Complainant on August 1, 1997 as a driver of a bus designed to transport more than ten passengers including the driver. (Stipulation) Complainant was discharged by Respondent effective November 13, 1997. (Stipulation) At the time of his discharge Complainant was earning $9.50 an hour. (Tr. 432-35)

On November 12, 1997 Complainant was scheduled to drive a bus on a three hour round trip route which picked up passengers at customer pick up and ticketing locations at the Littleton and Green Mountain suburbs of Denver, Colorado for transport to Harvey's Casino in Central City, Colorado by way of the foothills and mountains northwest of Denver. (Tr. 15, 16) The return route transported Casino patrons back to the Littleton and Green Mountain pick-up locations.(Tr. 15, PP[1]-X3) Complainant completed one round trip in Bus no. 15 by 11:00 a.m. In the course of the trip Complainant found the "Canyon" part of the trip (the final twenty miles to Central City) to be icy and snow packed in spots. He experienced lots of backsplash, throwing up dirt and mud onto the windows, requiring him to use the windshield washer system "quite a lot." (Tr. 22-25) Complainant expected the backsplash to worsen because the snow was melting. (Tr. 25)

After lunch, at about 12:00 p.m., Complainant took over

[1]PPX - Prosecuting Party Exhibit

Respondent's forty-seven passenger Bus no. 16 from driver Terry Rogers at the Littleton pick-up location. (Tr. 25, 26) Prior to the start of his trip, Complainant performed the mandatory pre-trip inspection and discovered that the side mirror on the driver's side was stuck and would not adjust to allow a clear view down the side of the bus. (Tr. 27-30) Complainant called his dispatcher. Jim Smith, his supervisor, answered. Complainant requested another bus, explaining that this one was unsafe to drive as the driver's side mirror was unadjustable and he could not see behind the bus. Smith responded to go ahead and drive as there was no other bus available and no one would be passing on the driver's side. (Tr. 30-32, 173, 174) Complainant expressed anger at Smith's instructions. Terry Rogers, the bus driver who Complainant was relieving, testified that the Complainant hung up the phone and exclaimed, "...this was bullshit, we don't need this shit, and he's not going to do anything for me." (Tr. 475) Complainant then returned to the bus where he managed to marginally adjust the mirror by beating on it with both fists. Although Complainant was able to move the mirror, the alignment was not as it should have been. (Tr. 32, 33)

Complainant's pre-trip inspection also found that flow from the windshield washer system was "clearly inadequate" to clean the bus' windshield as it produced only a fine mist that did not reach the windshield. (Tr. 34, 35) Complainant again called the dispatcher, and again talked to Jim Smith. He explained that the windshield washer system was not operable and asked for another bus. Smith's answer was the same. No bus was available; go ahead and drive Bus no. 16. (Tr. 35)

Complainant proceeded to drive Bus no. 16 with the passengers on board to the Green Mountain pick-up stop, a drive that takes about twenty-five minutes. Complainant described the road conditions as pretty sloppy; the roads were wet with a lot of slush and water, and there was snow and ice in one of the lanes. (Tr. 37-41, 128, 129) The backsplash on the windshield was "pretty considerable" as Complainant used the wipers constantly to keep the windshield clear. (Tr. 37) The dirt in the backsplash kept building up, making it progressively more difficult to see. (Tr. 37) During this drive to Green Mountain Complainant made two telephone calls from the bus back to dispatch. The calls were answered by Dee Thurman, a dispatcher for Respondent. Complainant's first call advised Thurman to have evening drivers bring with them a couple of extra gallons of windshield washer fluid. Complainant had checked the fluid compartment and found fluid present but "there wasn't a lot." Complainant thought more fluid might enable the washers to work better. (Tr. 37-41) Complainant's second call was also answered by Thurman. Complainant told Thurman that the problem with the inoperable windshield washers was severe enough that he needed to be assigned another bus. (Tr. 41) Thurman responded that there

was no other bus immediately available, but that she would dispatch a replacement bus from Harlan Colorado, another casino stop, to Green Mountain. (Tr. 41)

Complainant arrived at Green Mountain at about 12:40 p.m. After on-loading the waiting passengers, Complainant purchased windshield washer fluid and added the fluid in an unsuccessful attempt to fix the washer system. (Tr. 42) Complainant again called the dispatcher from the bus to advise Thurman that the washer system was still not working and that he should not drive the bus as it was unsafe. Thurman replied that a different bus, Bus no. 12, was on its way from the Harlan casino stop. (Tr. 43, 44) Complainant then suggested to Thurman that a backup bus he observed sitting in parking lot at Green Mountain lot be used while Bus number 16 was being repaired. (Tr. 44) According to Complainant, Thurman responded to the effect that you drive and I'll dispatch. (Tr. 44)

Complainant told his passengers that another bus was coming and they should go into the casino ticket office to wait. (Tr. 53, 131) Complainant then left the bus himself and went into the ticket office to use their telephone to call Jim Von Dreele, General Manager for Respondent. (Tr. 46) Complainant used a phone located in a back office away from the ticket counter rather than the mobile bus phone because he wanted privacy and did not want his conversation to be overheard by the passengers. (Tr. 48) Complainant told Von Dreele about being ordered to drive Bus no. 16 despite the problems with the mirror and the windshield wiper. (Tr. 49, 50, 135) Complainant was upset as he talked to Von Dreele. Von Dreele responded by telling Complainant to calm down and wait at the ticket stop, and he would look into the situation. (Tr. 135) Complainant was left with the impression that he would be notified with further instructions. (Tr. 51)

Susie Rau, the receptionist at the Green Mountain ticket office, testified that Complainant was on the phone in the back office for five to ten minutes during this conversation with Von Dreele and was speaking in a loud voice and that he banged on the table. (Tr. 276) When Complainant completed his telephone conversation, he left the back office and walked over to the reception desk where some of the bus passengers had congregated and were talking to Rau. The passengers were insisting that they be given free rides to the casino. Rau expressed doubt that the casino would provide free ride tickets and suggested they talk to Complainant about the Respondent providing free tickets. (Tr. 53-55) Complainant expressed doubt that the Respondent would provide free tickets. Complainant characterized the mood of the passengers gathering at the reception desk as upset about not going to the casino, upset about not being able to board another bus that was on site, and upset by having to wait for another bus. The passengers asked for the name of a person to whom they

could complain and who would authorize free ride tickets. Complainant suggested they call Jim Van Dreele or the casino management. (Tr. 55, 56)

Rau testified that when she heard that the bus being driven by Complainant was not going to leave for the casino, she decided to place a call to the Respondent to have another bus sent. She talked to Van Dreele who advised her that he would send another bus. (Tr. 277) Unfortunately, the replacement bus was late because it became lost after taking a wrong turn. (Tr. 417) Rau described the Complainant as being visibly angry and upset. (Tr. 279) She characterized the bus passengers, who were now in the lobby, as angry at the delay. They became loud after hearing the Complainant raise his voice. (Tr. 278) Rau testified that the passengers were upset because Complainant told them that he was being ordered to drive a bus that was unsafe and that he refused to do that. (Tr. 288) The passengers calmed down when Rau issued free tickets, apologized and assured them that they would be getting another bus. (Tr. 278, RX[2]F)

While Complainant was at the reception desk he received a telephone call from Thurman, the Respondent's dispatcher, who told him that he had been pulled from the schedule for the day, to clean the windshield of the bus and return it to the terminal, and that the passengers would be taken to the casino by another bus driven by an other driver. (Tr. 61) Complainant returned the bus tickets to the passengers and informed them that they would be taken to the casino on another bus. (Tr. 62) Complainant cleaned the windshield with a wet paper towel that he had soaked in a puddle of water at the curb and drove the bus back to the terminal without the passengers. (Tr. 68)

Teresa McCracken is the human resources manager for Harvey's Casino, and Rau's supervisor. (Tr. 318) She returned from lunch on November 12, 1997 to find the Claimant and the bus passengers in the ticketing lobby. Observing that Rau had her hands full with the passengers, she moved behind the desk to assist Rau by answering the phone. She observing that Rau was handling the situation by talking to the passengers and telephoning the bus company to find out when another bus would arrive. (Tr. 314) McCracken took a phone call for Complainant from Respondent. She overheard Complainant say with a raised voice into the telephone that he was not going to take the bus. McCracken recalls thinking that she wanted to get Complainant to move out of the open area and into an office so the passengers would not hear him refusing to drive the bus. (Tr. 314) According to McCracken, after Complainant ended his telephone conversation, he made a "grand announcement" to all the passengers present that he had been pulled off the schedule, and was not going to drive the bus

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[2]RX - Respondent Exhibit.

to the casino, but instead was driving the bus back to the terminal. (Tr. 314, 315) McCracken testified that the passengers were upset because they did not know what was going to happen, and they did not know when they were going to leave for the casino. (Tr. 324) McCracken characterized their bearing as “kind of like lost.” (Tr. 317)

Complainant's drive back to the terminal was at least partially on an interstate highway which was almost dry with very minimal backsplash. (Tr. 69) As Complainant drove the bus into the terminal he was met by six representatives of the Respondent, Von Dreele, Smith, Bill Simons, dispatcher Herb McCartney, and two mechanics. (Tr. 69, 70) The two mechanics immediately investigated the windshield washer mechanism. (Tr. 70) “Everette had some of the hoses apart on the washer system and was checking them or blowing through them and trying to check for clogs.” (Tr. 70)

Complainant proceeded to a meeting with Smith, Van Dreele and Bill Simmons. Smith stated to Complainant that Respondent did not need an employee with his attitude and that Complainant had the option of submitting his resignation or being fired. (Tr. 71) Smith elaborated that Complainant was being fired because he had made passengers wait unnecessarily; that there was no reason for him to refuse to drive because there was nothing wrong with Bus no, 16, and he should have gone ahead and driven it. (Tr. 71, 73) Complainant disagreed; he protested that he should not have to continue to operate a bus without being able to see out. Van Dreele concluded the meeting by suggesting that they look into the situation further and meet again the following day. (Tr.74)

Everette France is a shop foreman for Respondent. He supervises three mechanics and two mechanic helpers. He has himself worked as a mechanic on buses for twenty years. France inspected the windshield washer mechanism when Complainant brought the bus back to the terminal on November 12. France found the cause of the washer’s failure to operate to be that the tube which is intended to draw fluid from the fluid reservoir had become filled with air and was floating above the fluid level in the reservoir. (Tr. 451)

Complainant met the next day, November 13, 1998, with Von Dreele and Smith. Complainant was presented with a “Corrective Counseling Record” form and told that his employment was terminated. The explanation for his termination as provided on the form was:

> On 11-12-92, while in charge of Harvey’s Schedule #2, our departure was delayed one hour as a result of your action in refusing to drive Bus-15. Your refusal was based on a mirror being out of adjustment and a dirty windshield. In addition witnesses indicate that you

> incited your passengers and worsened the situation by making disparaging remarks about the company and urging them to call various members of management to complain. (Tr. 81-84, 155-156, PP X9)

Complainant denied to Von Dreele and Smith that his actions delayed the departure of the bus for one hour or that he made disparaging remarks to any of the passengers toward the company. (Tr. 82, 83)

Complainant subsequently got a job as an over the road truck driver with Stevens Transport of Dallas, Texas. He worked for Stevens for a little over a month during December, 1997 and January, 1998. (Tr. 93) Complainant discontinued his employment with Stevens because he experienced some problems with a degenerative left knee while driving over-the-road. (Tr. 94) Complainant moved to Florida in February, 1998 to live with his parents. He took a job in Florida with Mears Transportation[3] as a passenger bus driver. (Tr. 95)

PRIMA FACIE CASE

Section 405 of the STAA was enacted in 1983. This legislation is intended to promote safety of the highways by protecting employees from disciplinary action because of an employee's engagement in protected activity. 49 U.S.C. § 31105.

In a case brought under section 405(a), the initial burden is on the Complainant to establish a prima facie case of retaliatory discharge. To do so, Complainant must establish: (1) he was engaged in protected activity under the STAA; (2) he was the subject of adverse employment action and the employer was aware of the protected conduct when it took the adverse action; and (3) there was a casual link between his protected activity and the adverse action of his employer. Once Complainant establishes a prima facie case, raising the inference that the protected activity was the likely reason for the adverse action, the burden shifts to Respondent to demonstrate a legitimate non-discriminatory reason for its action. Even if Respondent demonstrates such a reason, Complainant may prevail by showing that the stated reason was pretextual. Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). If, however, the trier-of-fact decides that there were "dual motives" for the adverse action, that is, that the employer's action was motivated by both an illegal motive and a legitimate management reason, the employer may prevail only by showing by a preponderance of the

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[3]Department of Labor exhibit 19 refers to the employer as Mears Distribution. However Complainant testified that the correct name is Mears Transportation. (Tr. 539)

evidence that it would have taken the same action even if the employee had not engaged in the protected activity. Palmer v. Western Truck Manpower, 85-STA-6, (Sec'y 1987).

Protected Activity

The employee protection provisions of the STAA prohibit discharging an employee for reason that: (B) the employee refuses to operate a vehicle because-- (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. 49 U.S.C.A. § 31105(a)(1)(B) (West 1994). See Williams v. Carretta Trucking, Inc., 94-STA-7, (Sec'y 1995).

Violation of commercial motor vehicle regulation

49 U.S.C. §31105(a)(1)(B)(i) protects a refusal to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." See Beveridge v. Waste Stream Environmental, Inc. 97-STA-15 (ARB Dec. 23, 1997). The Prosecuting Party argues that the Complainant's actions in refusing to drive the bus with the inoperable window washer system is activity protected by §31105(a)(1)(B)(i) because driving the bus under the weather conditions present during his route on November 12, 1997 would violate Colo. Rev. Stat. 42-4-201(4), which provides that: "No vehicle shall be operated upon any highway unless the driver's vision through any required equipment is normal and unobstructed." The statutory provision covering a federal motor safety violation -- 49 U.S.C. § 31105(a)(1)(B)(i) -- incorporates the laws of the jurisdiction in which the vehicle is being operated. See 49 C.F.R. § 392.2 which provides, in pertinent part, that every commercial motor vehicle "must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated." Hence, because Complainant was driving in the State of Colorado, Colorado motor vehicle law was subsumed and incorporated within 49 U.S.C. §31105(a)(1)(B)(i) as a "regulation" or "standard" of the United States by reason of 49 C.F.R. §392.2. Similarly, in Brock v. Roadway Express, Inc., 481 U.S. 252, 255 (1987), the Supreme Court stated that the STAA protects employees "from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations . . . ."

To be protected under subsection (i), the complainant must show that operating the vehicle would have caused an actual violation of a motor carrier safety regulation; it is not sufficient that the driver had a reasonable belief about a violation. Yellow Freight Sys., Inc. v. Reich, 38 F.3d 76(2d Cir. 1994); Yellow Freight Sys., Inc. v. Martin, 983F.2d 1195, 1199 (2d Cir. 1993); Robinson v. Duff Truck Line,Inc., Case No. 86-STA-3, Final Dec. and Ord., Mar. 6, 1987,slip op. at 12-13, aff'd sub nom. Duff Truck Line, Inc.v. Brock, No. 87-3324 (6th Cir. June 24, 1988). Here, Complainant has met that burden as he has shown that if he had driven Bus no. 16 without an operable windshield washer system on November 12, he would have operated a vehicle with a windshield obstructed by a backsplash of dirt and mud as a result of the sloppy weather conditions that day. Complainant had earlier on the same day completed one round trip in another bus and found the canyon road to be icy and snow packed in spots, and the drive itself to be marred by lots of backsplash of dirt and mud onto the windows, requiring the use of the windshield washer system "quite a lot." Claimant expected the backplash to worsen on this second trip because the snow was melting. Therefore, Complainant has established that his refusal to drive Bus no. 16 to Harvey's Casino constituted protected activity under the "violation of regulation" clause of the STAA.

Reasonable Apprehension Clause

Respondent's actions also violated the "reasonable apprehension clause" of STAA. The purpose of this clause is the protection from employer discipline to employees who refuse to operate equipment they reasonably believe to be unsafe. Subsection (ii) provides as follows:

> [A]n employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.49 U.S.C.A. § 31105(a)(2).

In the instant case, the Complainant could reasonably conclude that driving Bus no. 16 with the inoperable windshield washer mechanism presented a bona fide danger of an accident. Much of the trip would be over mountainous terrain on the Clear

Creek Canyon Road. Complainant described the canyon road as a two lane paved highway with a third passing lane only at two locations westbound to allow for passing of slower moving vehicles. Complainant testified that there are only a few places along the side of the road where a vehicle could safely pull over in the event of a breakdown, and some of those places would present difficulties for re-entering the highway. (Tr. 18-21, 37)

Respondent argues that the loss of the windshield washer system did not render the Complainant's bus unsafe. Respondent refers to the testimony of Terry Rogers, a motor coach bus driver for Respondent, who offered the opinion that a bus is not unsafe to drive because it lacks an operating windshield washer system in that a driver can take measures to improve visibility. Rogers suggested pulling off the road and using a spray bottle, snow or even a dry towel to clean the windshield, or driving behind another vehicle to let its backspray act as a cleaning spray on the windshield. (Tr. 504-5) However, Rogers' cross-examination testimony corroborated, to a large extent, Complainant's testimony and supported Complainant's decision to not drive the bus with the inoperable washer system. Rogers testified on cross-examination that he drove Bus No. 16 on the morning of November 12, before it was assigned to Complainant , and that the washer system was not working adequately in that it was producing only a mist rather than a spray, but that he was able to get it so "you could see out, could see your mirrors safely enough, and it was operational. Otherwise, I would have called for a mechanic to come out and make an adjustment for me." (Tr. 483) Rogers testified further that he had informed an investigator from the Department of Labor that the wipers were clearing the windshield sufficiently that he could see his mirror and could see for oncoming traffic to his right, but if the washers had not been working and clearing the windshield adequately, he would have refused to drive the bus. (Tr. 487)

Complainant's apprehension that Bus no. 16 was unsafe to drive on the afternoon of November 12 with the windshield washer mechanism inoperative is accepted as reasonable. An operable windshield washer mechanism may not always be necessary for the safe operation of a forty passenger bus, but the sloppy and icy weather conditions existing on November 12, 1997 and the terrain of the canyon road could cause a reasonable driver to be concerned with the safety of the bus and his passengers if he was not sure that he had the capability to keep his windshield clear enough to see the road and his mirrors.

A requirement for finding a driver's actions to be considered as protected activity under the reasonable apprehension clause is that the driver seek correction of the unsafe condition from his employer before refusing to drive. Here, Complainant placed a telephone call to the dispatcher immediately after his pre-trip inspection to complain that the windshield washer was inoperative. He was instructed by Jim Smith, his supervisor, to go ahead and drive Bus no, 16; that no other bus was available. Complainant also made two additional calls to the dispatcher during his drive to Green Mountain, as well as a call to Von Dreele once he reached Green Mountain, to complain about the inoperable windshield washer mechanism. Complainant emphasized to Von Dreele that he had been ordered to drive the bus despite the problems with the windshield washer. Thus, Complainant has established that his refusal to drive passenger Bus no. 16 to Harvey's Casino constituted protected activity under the reasonable apprehension clause of the STAA.

Adverse Action

Complainant suffered an adverse action when his job with Respondent was terminated by Von Dreele on the morning after his refusal to drive the bus from the Green Mountain ticket office to Harvey's Casino. Von Dreele was aware of Complainant's complaints about the windshield washer and his refusal to drive the bus at the time he fired Complainant. Complainant has established the second element of his prima facie case.

Casual Link Between Adverse Action and Protected Activity

In establishing a prima facie case Complainant need only raise the inference that his engaging in protected activity caused the adverse action. Stiles v. J.B. Hunt Transportation, Inc., 92-STA-34, (Sec'y 1993). The proximity in time between protected conduct and adverse action alone may be sufficient to establish the element of causation for purposes of a prima facie case. Deeneway v. Matlack, Inc., 88-STA-20, (Sec'y June 15, 1989).

Complainant has presented sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action. The record shows that the Complainant was terminated from his employment within 24 hours of engaging in protected activity. Furthermore, the substance of the

conversation at the two meetings that Von Dreele, Smith and others had with the Complainant on the afternoon of November 12, 1998 and the morning of November 13, 1998 establish, at least in part, a causal link between the protected activity and the adverse employment action.

The conversation between Complainant, Von Dreele, Smith and Bill Simons immediately after Complainant arrived at the terminal from Green Mountain where Smith told Complainant that Respondent did not need an employee with Complainant's attitude; that Complainant was being fired because he had made passengers wait unnecessarily; and that Complainant had no reason for refusing to drive as there was nothing wrong with Bus no. 16, evidences a causative relationship between Complainant's refusal to drive and his job termination.

At the meeting the next morning, Von Dreele presented Claimant with a "Corrective Counseling Record" form and told him that his employment was terminated. The explanation for his termination as provided on the form also evidences a causative relationship between Complainant's refusal to drive and his job termination.

Complainant has established a prima facie case under the STAA because of the proximity of the termination meeting to the occurrence of the protected activity and because of the expressed basis of the termination as set forth in the statements by Smith on November 12 and the Corrective Counseling Record form presented to the Complainant on November 13.

Respondent's Defense

If the Complainant establishes a prima facie case, the burden shifts to the Respondent to rebut the presumption of disparate treatment by producing evidence establishing that the Respondent's action was motivated by legal nondiscriminatory reasons. However, the Respondent need only produce this evidence, the ultimate burden of persuasion is on the Complainant to show the action against him was discriminatory. McGavock v. Elbar, Inc., 86-STA-5, (Sec'y 1986).

Respondent asserts that it had a legitimate business reason for Complainant's termination. Respondent asserts that the reason for the termination was not Complainant's refused to drive

the bus but his actions in provoking a disturbance at the Green Mountain ticket office. Respondent describes Complainant's actions as an "almost ballistic" tirade; that Complainant "used foul language, violently shouted and banged his fists in hearing range of Harvey's lobby; that he incited at least twenty passengers into a frenzy; and that he affected the business relations between Harvey's and its customers."[4]

The initial employment action taken against Complainant was his suspension pending discharge by Von Dreele during the meeting on the afternoon of November 12, 1997. (Tr. 409) That suspension could not have resulted from Complainant's behavior at the ticketing office of Green Mountain since, at the time of the meeting, Von Dreele had no knowledge of any intemperate behavior. The purpose of the meeting according to Von Dreele was to consider Complainant's heated statements to Smith during the two telephone conversations earlier that day and Smith's desire to fire Complainant because of those statements. (Tr.401, 407) Von Dreele testified that Smith was upset because he felt that Complainant had "overstepped the line in...refusing to drive the bus, getting excited, getting outraged on the phone..." (Tr. 400) Knowledge that Von Dreele gained of Complainant's behavior at Green Mountain was obtained subsequent to the November 12, 1997 meeting when Von Dreele received a telephone call from John East, the charter sales manager of Harvey's casino. Thus Complainant's suspension on November 12 could not have been based on his conduct that, according to Respondent, provoked a disturbance at the Green Mountain ticketing office earlier that day.

Also, the extent of Von Dreele's knowledge about Complainant's behavior at Green Mountain when he terminated Complainant on November 13 is uncertain. Von Dreele testified that his knowledge about Complainant's behavior came from conversations with Rau and East. "I got a call from [Rau] and she said that while Doug was there that he incited the customers, displaying unprofessional behavior, disturbed their normal operation, slamming his fist on the tables, using a high-level voice. (Tr. 410) However, Rau's testimony is inconsistent. Rau testified that she does not remember talking to Von Dreele on November 12 or 13, 1997. (Tr. 293) Rather, she prepared a report of the incident for East, a report which was not forwarded to Von Dreele until after the Complainant was fired on November 13. (Tr. 352) Rau's testimony that she

[4]Closing Brief of Respondent, p. 11.

remembers reporting on the matter only to East is accepted. It is less plausible that Rau would herself telephone Von Dreele to complain about the incident. It is more likely that she would follow the advise of McCracken, her supervisor, and prepare the report for East, a Harvey's manager.

Von Dreele did receive a telephone call from East before the November 13 meeting. East protested to Von Dreele: "...this is totally uncalled for. We can not afford this kind of activity, this kind of customer service interruptions." (Tr. 411) East testified that the knowledge he had about the incident at the time he telephoned Von Dreele came from talking to Rau and McCracken. East recounted that when he walked in the door after returning from lunch he was met by Rau who told him about an incident where the scheduled bus was unable to take the passengers to the casino and the driver exacerbated the problem. East discussed the matter with McCracken who corroborated generally Rau's verbal report and stressed the "employee service issue." (Tr. 342) East then placed the telephone call to Von Dreele to relay his concerns. (Tr. 343)

Thus, at the time that Von Dreele terminated Complainant's employment on November 13 he had information only from East about Complainant's behavior at the Green Mountain ticketing office. East did not testify that he told Von Dreele during their telephone conversation on November 12 that the Complainant had experienced an almost ballistic tirade, used foul language, violently shouted and banged his fists, or incited at least twenty passengers into a frenzy.[5] In fact neither Rau nor McCracken testified that they observed such behavior. Rather, East testified that he had two concerns about the incident. First, there was no bus to transport people to the casino; and second, the driver made the situation worse by "heightening the tensions of the customers" instead of attempting to calm them through an apology or explanation. (Tr. 345)

Rau's written report to East states that Complainant

[5]The only reference to the occurrence of foul language was the testimony by Rogers, the driver whom Complainant relieved, that Complainant had used such language in anger after ending his telephone conversation with Smith at the Littleton pick-up location.

became very loud and pounded on the desk while talking on the telephone in the bus waiting room, and that he continued to be upset when he came out from the waiting room, announcing that he couldn't drive the bus and that the passengers should be sent to the casino on a back-up bus that was present at Green Mountain. Her report continued that when the customers started coming in to see why the bus was late, Complainant told them that the back-up bus should take them, and they should telephone Respondent and complain. The report concluded that the passengers became angry and in reaction, Rau gave them a free pass.

Rau's testimony is consistent with her written report. She testified that Complainant walked in to the ticketing office reception area and asked if he could use the phone. Rau did not notice whether Complainant was angry as she was busy on the phone. (Tr. 297) Rau directed him to the telephone in a back office. (Tr. 280) She heard Complainant talking on the phone in a loud voice and banging on the table about four or five times. The conversation lasted about five minutes. She heard Complainant say that he would not drive the bus because it was unsafe. (Tr. 309) Rau testified that Complainant came into the lobby area looking very angry about the same time some of the bus passengers arrived. (Tr. 277) Rau heard Complainant announce to the passengers that he was not going to drive the bus, and she observed the passengers respond in anger. "Gamblers are very strange people. When they want to go, they want to go. They don't have a whole lot of patience." (Tr. 278) She felt that the Complainant made the situation worse by telling the passengers that they should telephone Marco, the owner of Respondent Company, and Von Dreele to complain. (Tr. 278) Rau reacted by placing a telephone call to Von Dreele, telling him that the passengers were upset that they could not get on the bus, and requested that another bus be sent over as soon as possible. (Tr. 282, 291) Von Dreele agreed to send another bus as soon as possible, and asked to speak to the Complainant. (Tr. 292, 306, 307) The replacement bus was late because the driver lost his way. (Tr. 308, 417) Rau testified that the commotion lasted about thirty minutes; that the passengers calmed down when she apologized profusely, assured the passengers another bus was on its way, and gave out free bus passes. (Tr. 283-4) Rau portrayed the passengers as upset and angry when the Complainant told them that he had been instructed but refused to drive an unsafe bus. (Tr. 288)

Teresa McCracken's testimony was particularly cogent.

McCracken was critical of the way that the Complainant interacted with the passengers from a customer service viewpoint. She offered the opinion that the passengers might not have reacted so angrily if Complainant had handled the situation by apologizing to the passengers for not being able to drive the bus to the casino, and assuring that the bus company would rectify the situation. "...it sometimes isn't necssarily what you say, but how you say it." (Tr. 315, 316)

As previously stated, the record is unclear on what information Von Dreele had regarding Complainant's conduct at the ticketing office on November 12. The record shows that Von Dreele talked only to East before terminating the Complainant on November 13. Also, Rau testified that she did not submit her report to East until after East had talked to Von Dreele. Nevertheless, assuming that Von Dreele's knowledge about Complainant's conduct at the time he fired Claimant was equivalent to the information as developed at the hearing, the record reveals that the passengers' anger was not a reaction to intemperate conduct by Complainant but to his blunt and impolitic message, that is, the bus on which they were passengers would not continue on to the casino, that the bus company was insisting he drive the bus even though it was unsafe, and that he did not know if and when a replacement bus would arrive. As inferred by McCracken, Complainant could have shown more tact and could have shown more concern for the passengers. He could have been apologetic when he announced that he had been pulled off the schedule and would not take the bus to the casino. He could have told the passengers that a replacement bus was on its way. He could have refrained from suggesting that the passengers complain to the Respondent, and he did not have to point out the back-up bus setting in the Green Mountain parking lot. In effect, as expressed by McCracken, he could have been more customer oriented.

The Secretary has addressed intemperate language and impulsive behavior associated with the exercise of STAA rights. Kenneway v. Matlack, Inc., Case No. 88-STA-20, (Sec'y 1989, slip op. at 6-7, 10-13); Ertel v. Giroux Brothers Transportation Co., Case No. 88-STA-24, (Sec'y 1989, slip op. at 20-21, 30-31) Cf. Dunham v.Brock, 794 F.2d 1037 (5th Cir. 1986) (employee protection provision of Energy Reorganization Act). In such cases the Secretary has considered labor relations precedent. The "well settled" standard employed under the National Labor Relations Act requires balancing the right of the employer to maintain shop discipline and the "heavily protected" right of employees to bargain effectively:

to fall outside statutory protection, an employee's conduct actually must be "indefensible under the circumstances." NLRB v. Southwestern Bell Telephone Co., 694 F.2d 974,976-977 (5th Cir. 1982). See Reef Industries, Inc. v.NLRB, 952 F.2d 830, 836-838 (5th Cir. 1991) (satirical letter and tee-shirt were not so offensive as to lose protection "when not fraught with malice, obscene, violent, extreme, or wholly unjustified"); NLRB v. Lummus Industries, Inc., 679F.2d 229, 233-235 (11th Cir. 1982) ("allegedly false and defamatory statements" made in context of concerted activity"will be protected unless they are made with knowledge of their falsity or with reckless disregard for their truth or falsity"). Moreover, "an employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee." NLRB v. Southwestern Bell Telephone Co., 694 F.2d at 978-979. See NLRB v. Steiner film, Inc., 669 F.2d 845,851-852 (1st Cir. 1982), citing Trustees of Boston University v. NLRB, 548 F.2d 391, 392-393 (1st Cir. 1977)("insubordination was an excusable, if a regrettable and undesirable, reaction to the unjustified warning . . . received just minutes before," and the discharge therefore was improper).

Under the reasoning employed in the above cases, and particularly in the STAA Kenneway and Ertel cases, Complainant's behavior at the ticketing office in reaction to the Respondent's failure to provide a different bus or otherwise rectify the windshield washer problem neither removes statutory protection nor provides Respondent with a legitimate, nondiscriminatory motivation. Respondent's allegations that the Complainant engaged in an "almost ballistic" tirade or that Complainant "used foul language" has no support in the record. Rau testified that Complainant banged his fist on a table while he was in the ticket room on the telephone with Von Dreele, but there is no showing that the passengers had yet entered the Lobby or were within hearing range of the ticket office lobby. In reality, the passengers' anger was not caused by Complainant's behavior. Their anger and any hostility toward Respondent or Harvey's Casino was a natural reaction to the unavailability of the bus for which they had purchased a pass to take them to the casino. That anger may have been aggravated by Complainant's announcements as his statements implied an indifference to the passengers plight on the part of Respondent and Harvey's. But his statements were not so indefensible under the circumstances that they remove him from the protection afforded under the STAA. In proffering Complainant's behavior, Respondent has failed to meet its burden to produce evidence that Complainant's discharge was

motivated by a legitimate, nondiscriminatory reason. Complainant's behavior was not Respondent's "reason" for discharge and is not legally sufficient to justify judgment in its favor. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 255.

Complainant has succeeded in establishing a prima facie case of unlawful discrimination under the STAA, and Respondent has failed to rebut that case.

DAMAGES

Complainant was unemployed from November 13, 1997 the date on which his job was terminated by Respondent, until he took a job as a truck driver with Stevens Transport on December 21, 1997. He worked at Stevens until January 10, 1998. Complainant left employment with Stevens because degenerative arthritis in his left knee caused him problems driving over the road. Complainant relocated to Florida and took a job with Mears Transportation on January 26, 1998 as a passenger bus driver. Complainant's earnings from the time he was fired on November 13, 1997 until the March 24, 1998 hearing were appoximately $2,923.95. Department of Labor Exhibit 19 shows Complainant's wages during the period as $2,623.95 plus unknown wages for a period of employment from January 4, 1998 to January 10, 1998. $300.00 is set as wages for that period based on documentation showing the amount of $300.00 earned during equivalent periods of December 21 to December 27, 1997 and December 28, 1997 to January 3, 1998.

The Prosecuting Party argues in its post hearing brief that the Complainant worked sixty hour weeks during his employment with the Respondent, therefore his loss of earnings should equate to a loss of wage earned over a sixty hour work week. However, the Complainant did not testify to working a sixty hour work week, and the record is otherwise void of evidence of same. PPX 13 is Complainant's last pay stub and it shows 75.75 hours of work. Complainant testified that was paid every two weeks. There is testimony that the Complainant started work on November 12, 1997 at 6:00 a.m. and would have worked until 6:00 p.m. had he not been forced to return to the

office. However, there is no evidence that such a twelve hour work day was either typical or unusual. Thus Complainant is assumed to have worked a 40 hour work week.

Complainant 's loss of earnings because of the termination equates to $3,916.05, or $6,840.00 ($9.50 per hour x 40 hour week x 18 weeks from date of firing to date of hearing) he would have earned from Respondent had he not been fired minus the $2,923.95 that he did earn. Complainant also claims damages of $875.76 as the cost of his relocation to Florida to take the passenger bus driver job with Mears Transportation. (Rental truck cost of $500.85 + fuel cost of $283.47 + storage costs of $91.44).

Respondent argues that the Complainant took no steps to mitigate his loss of wages. However, the record shows that the Complainant set up two or three job interviews with prospective employers within days of his termination and accepted employment and started training with Stevens Transportation within three weeks of his termination. (Tr. 537, 564, EX 19) Complainant also testified that he relocated to Florida because he had lost his job, his residence and car and he therefore considered his best interest was to move in with his family in Florida. (Tr. 536) Complainant's explanation for his move and the fact that the move resulted in part because of loss of job and loss of its income is accepted.

Respondent also argues that unemployment compensation received by the Complainant for three weeks should be subtracted from any damages due Complainant. Respondent's argument is rejected as it has been held that unemployment compensation is not deducted from a back pay award pursuant to the STAA. Moyer v. Yellow Freight System, Inc., 89-STA-7 (Sec'y Aug. 21, 1995).

CONCLUSIONS OF LAW

1. The Surface Transportation Assistance Act governs the parties and the subject matter.

2. Complainant has demonstrated that he was engaged in protected activity when he refused to drive Bus number 16 on November 13, 1997 because the windshield washer was inoperable on a day that his windshield was becoming progressively more dirty from splashback and he was driving over mountainous terrain roads that were partly covered with snow and ice and were wet with slush and water, as the evidence shows operation of this vehicle would have violated 49 C.F.R. § 383.83 and the evidence shows Complainant had a reasonable apprehension of harm to himself and the public.

3. Complainant presented sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action.

4. Complainant has demonstrated that his employment with Respondent was terminated as a result of his protected activity.

5. In proffering Complainant's behavior with the passengers at the ticketing office on November 12, 1998, Respondent has failed to meet its burden to produce evidence that Complainant's discharge was motivated by a legitimate, nondiscriminatory reason.

RECOMMENDED ORDER

Based on the foregoing, the following order is recommended:

1. Respondent, Four Winds Inc., d/b/a People's Choice Transportation, Inc., shall:

a. Pay directly to Complainant back wages, less interim earnings, which sum is computed to be $3,916.05, and $875.76 in moving expenses;

b. Pay interest on the sum awarded to Complainant calculated in accordance with 26 U.S.C.A §6621;

C. Expunge all adverse references to Complainant's termination from employment from his personnel records with Respondent.

_____

THOMAS M. BURKE
Associate Chief Judge

Dated: November 18, 1998
Washington, D.C.
TMB:crb